IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-782

GATEWAY COAL COMPANY, *Petitioner*,

v.

UNITED MINE WORKERS OF AMERICA; DISTRICT NO. 4, UNITED MINE WORKERS OF AMERICA; LOCAL NO. 6330, UNITED MINE WORKERS OF AMERICA, *Respondents*.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE BITUMINOUS COAL OPERATORS' ASSOCIATION, INC., AMICUS CURIAE

GUY FARMER
Patterson, Belknap, Farmer & Shibley
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036
General Counsel for Bituminous Coal Operators' Association, Inc.

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Bituminous Coal Operators' Association, Inc., herein called BCOA, respectfully moves the Court for leave to file a brief *Amicus Curiae* in support of the Petition for Certiorari in this case.

BCOA is an incorporated association of Coal Operators. Its members produce about 65 percent of all

bituminous coal produced in the United States and the vast majority of the coal produced by signatories to the National Bituminous Coal Wage Agreement. BCOA negotiates the agreement with the United Mine Workers on behalf of its members, and takes a major role in the interpretation and implementation of the agreement. BCOA is also the major national spokesman and representative of the industry in health and safety matters.

The decision of the Third Circuit Court of Appeals in the *Gateway Coal Company Case* directly affects both the labor agreement and safety. The decision purports to interpret the 1968 Wage Agreement and improperly holds that safety grievances are not arbitrable. While the 1971 Agreement has since superseded the 1968 Agreement and contains some special provisions relating to health and safety issues, there is no question that safety grievances have always been subject to arbitration under the prior agreements.

If it is to be held that safety grievances are not arbitrable and that employees may freely engage in wildcat strikes over such grievances, BCOA foresees chaotic labor conditions in the coal industry. The consequent loss of production would seriously endanger the Nation's supply of coal.

The decision of the court below thus infringes directly upon the BCOA's two major concerns—stability of labor relations and health and safety. BCOA, therefore, has a direct and substantial interest in the outcome of this proceeding.

BCOA has attempted to obtain consents to the filing of this brief, but has obtained a consent from one party only.

WHEREFORE, BCOA moves the Court to allow the filing of the Brief, *Amicus Curiae,* which is submitted herein with the requisite number of printed copies.

Respectfully submitted,

GUY FARMER
Patterson, Belknap, Farmer & Shibley
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036
General Counsel for Bituminous Coal Operators' Association, Inc.

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BRIEF OF THE BITUMINOUS COAL OPERATORS' ASSOCIATION, INC., AMICUS CURIAE

INTEREST OF THE BITUMINOUS COAL OPERATORS' ASSOCIATION, INC.

The Bituminous Coal Operators' Association, Inc.,[1] is a voluntary non-profit association of bituminous coal mine operators. It was born in 1952 out of an effort to bring a degree of stability out of the labor-management relations chaos that had long characterized the coal industry. Since that time, BCOA has continued to exist

[1] Hereinafter referred to as BCOA.

for the purpose of negotiating periodic labor agreements with the United Mine Workers and aiding its members in interpreting these agreements and devising and strengthening mechanisms for bringing about industrial peace in the coal industry.

BCOA membership is open to any bituminous coal company that is a signatory to the National Bituminous Coal Wage Agreement. The membership includes both individual coal companies and state and local coal associations. The direct and indirect members of BCOA are located throughout the coal mining areas encompassing all of the coal producing states and collectively produce at least 65 percent of the bituminous coal produced in the United States.

BCOA is the primary industry instrument for the negotiation and interpretation of the National Bituminous Coal Wage Agreement. During the term of the labor agreement, BCOA functions as an industry representative in the relations between the United Mine Workers and the various coal company members of BCOA. BCOA has also long been the chief industry spokesman and representative on matters of health and safety.

BCOA, therefore, has a continuing interest in preserving and strengthening the contractual procedures for resolving grievances and disputes and in bringing industrial peace to the coal fields.

The decision of the court below will drastically weaken the efficacy of the contract grievance-arbitration procedures and will adversely affect the interests of BCOA and all its membership. It impinges directly and disastrously on BCOA's two major concerns—the stability of employment under the agreement and health and safety.

STATEMENT OF THE CASE

This Brief, *Amicus Curiae,* is addressed to the Petition of Gateway Coal Company for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

The Court of Appeals in a two to one decision reversed the judgment of the District Court and vacated a preliminary injunction which had been issued against Respondents for engaging in a strike over an alleged safety dispute. The preliminary injunction had been issued under the authority of the decision of the Court in *Boys Markets, Inc.* v. *Retail Clerks Union,* 398 U.S. 235 (1970).

Petitioner, Gateway Coal Company, is a member of the BCOA and is a signatory to the National Bituminous Coal Wage Agreement. The employees at the mine are represented by a local of the United Mine Workers of America, also signatory to the National Wage Agreement. BCOA negotiates and assists in interpreting this agreement.

This agreement contained a broad grievance and arbitration provision, providing for the settlement of all local disputes of any kind.

The Gateway mine, located in Greene County, Pennsylvania, is a large underground mine employing about 550 miners.

On April 15, 1971, there was a reduction of airflow in the mine, which was discovered by a foreman. However, the airflow was still above that required by the Federal Coal Mine Health and Safety Law. Nevertheless, mine management withdrew the day shift from the mine and sent in a special crew to locate and repair the malfunction. The repairs were made by mid-morning

and part of the crew returned to work for the remainder of the shift. Although instructed to stand by as provided in the labor agreement a part of the day shift crew went home and did not work on the shift.

A dispute then arose because of the refusal of the day shift crew to work the following day unless they received reporting pay. The Company offered to arbitrate the issue but the day shift struck and were joined by the men on the second and third shifts.

While inspecting the mine, the inspectors found, however, that three third shift assistant foremen had failed to make certain log book entries as required by federal regulations. The Company suspended two of the three foremen, but did not suspend the third because he had in fact reported the trouble.

The local union then voted to remain on strike unless the third foreman was also suspended from work.

Subsequently, on May 29, the Company was advised in writing by the Pennsylvania safety authorities that the foremen could be returned to work. The two suspended men were then reinstated.

The local union continued the strike.

The District Court issued a temporary restraining order against the strike on June 18, and a preliminary injunction on June 28.

The District Court found that the dispute over the suspension of the foremen was an arbitrable grievance under the labor agreement. The Court further ruled, however, that, since the Union claimed that the presence of the foremen in the mine was a safety hazard, the assistant formen should be suspended "until an impartial umpire has determined whether these men

should return to work." The Court further ordered that the parties proceed to arbitrate the dispute.

The dispute was arbitrated and, on September 2, 1971, the impartial umpire rendered his decision and award. He ruled that the dispute was arbitrable; that the refusal of the miners to work with the assistant foremen in question was unfounded because their presence in the mine would not render it unsafe; that the strike was without justification; and that the local union should not interfere with the reinstatement of the suspended foremen. Under the agreement, this award was final and binding on all parties.

Meanwhile, the Union had appealed the preliminary injunction to the Third Circuit Court.

On July 18, 1972, the court below reversed the District Court and dissolved the preliminary injunction.

The court below held that a safety dispute is "*sui generis*" and, consequently, not subject to the strong federal policy favoring arbitration of "the ordinary types of labor disputes." The dispute, the Court postulated, was not arbitrable, and as a consequence *Boys Markets* did not apply. The court reasoned that the labor agreement did not explicitly make "safety" disputes arbitrable, and because safety disputes are unique, should not be construed to encompass them. The court expressly refused to pass on whether it would hold otherwise "in the unlikely case of a contract specifically declaring that safety disputes are subject to compulsory arbitration . . ." (Footnote 1 to majority opinion).

The court stated flatly that:

> "If employees believe that correctible circumstances are unnecessarily adding to the normal

> dangers of their hazardous employment, there is no sound reason for requiring them to subordinate their judgment to that of an arbitrator, however impartial he may be." Opinion, p. 5.

Judge Rosenn dissented. He pointed out that there was a serious question whether the strike was because of a safety issue, since it started over the refusal of the Company to pay the men who went home on April 15.

Judge Rosenn held that the decision of the majority placed in the hands of an employee or group of employees the sole and unreviewable power to label another employee a working hazard and engage in a refusal to work and cause other employees unaffected by the issue to strike. He found that the majority decision ran "directly counter to our national labor policy of promoting labor stability" and opened "new and hazardous avenues in labor relations for unrest and strikes." Opinion, p. 10.

Judge Rosenn further found that the majority had misapprehended § 502 of the Labor-Management Relations Act, holding that provision does not oust arbitrators or courts from jurisdiction or prohibit courts from compelling arbitration of a safety dispute. He cited court authority for the proposition that when a union raises § 502 as a justification for a work stoppage, it must present "objective evidence" that an abnormally dangerous condition does in fact exist. Opinion, p. 9. In this regard, he thought it conclusive that the District Court had in its order forbade the foremen to return to work pending resolution of the dispute. Opinion, p. 11. By thus conditioning the injunction,

the national policy could be carried out without possibly endangering the safety of employees.[2]

The order of the court below, Judge Rosenn pointed out, accomplished nothing. It merely restored the parties to the impasse which confronted them in June 1971, with no apparent means of resolution other than self-help.

The Third Circuit has since applied its ruling in *Gateway* in another case arising under the 1968 Coal Wage Agreement at the Maple Creek Mine of United States Steel Corporation. In that case, the Union struck the mine over an alleged failure of a shift foreman to "show the proper concern for mine safety."

The court below in a *per curiam* opinion set aside a preliminary injunction issued by the District Court. The court below stated that *Gateway* held that the 1968 agreement did not bar miners from striking over safety disputes. The *per curiam* opinion characterized *Gateway* as holding that "it is the miners themselves who should make the determination as to what constitutes a safety hazard."

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[2] The court below ignored two other significant safeguards which are available to protect the miners from job hazards. The 1968 Coal Wage Agreement contains a provision which establishes a Mine Safety Committee of miners and empowers it to inspect any area of the mine; and, if the Committee finds that danger is imminent, and so informs the mine operator, the operator is required to remove all miners from the allegedly unsafe area. The same provision appears in the 1971 agreement. Art. III, § (g). See Appendix, p. 7a. Additional safeguards appear in the Federal Coal Mine Health and Safety Act of 1969. § 103(g) provides for an immediate inspection upon the request of the miners' representative; and under § 104(a) the mine inspector is empowered to issue an immediate withdrawal order if he finds that an imminent danger exists. 30 U.S.C. §§ 813(g), 814(a).

The *per curiam* opinion was joined in by three judges: Judge Gibbons, Judge Rosenn who had dissented in *Gateway* but felt bound, and Judge Layton who also felt bound but indicated his disagreement with the decision. *U. S. Steel Corp.* v. *UMW, et al.*, F.2d , 81 LRRM 2646 (3d Cir. 1972).

REASONS FOR GRANTING THE WRIT

A. THE DECISION OF THE COURT BELOW WILL ENCOURAGE INSTABILITY AND UNREST IN THE COAL INDUSTRY

The decision of the court below will do incalculable harm to labor stability in the coal industry and seriously impair the ability of BCOA members to produce an adequate supply of fuel to meet the Nation's needs.

The grievance and arbitration provisions of the National Bituminous Coal Wage Agreement have long been among the most liberal in industry in terms of their breadth and scope. Thus, for many years, the coal agreements have opened up to grievance and arbitration almost any conceivable local issue or trouble that might arise. The grievance and arbitration provisions are phrased so as to encompass any "differences" between the mine workers and the employer "as to the meaning and application of the provisions of this agreement," or any "differences . . . about matters not specifically mentioned in this agreement" or "any local trouble of any kind." See Appendix, pp. 1a, 2a.

There is no question that the tradition and practice in the coal industry has long been to give the widest scope to grievance-arbitration. It is also beyond question that for many years health or safety disputes could be heard under these procedures. This was true even

before the last negotiations in 1971 when the parties, in response to the growing concern for health and safety in the mines, went even further and devised a separate and specially designed procedure for handling health and safety grievances. See Appendix, pp. 4a-9a. Long before this, however, safety grievances were heard under the general provisions for settling local disputes.

BCOA is gravely concerned about the potential impact of the decision of the court below on the stability of labor relations in the coal mining industry. The decision, if allowed to stand, will deal a staggering blow to BCOA's hopes of achieving coal miner acceptance of peaceful procedures for resolving disputes and grievances of all types.

The decision of the court below carves out all safety disputes or grievances and labels them *"sui generis"* and non-arbitrable. The court below quite literally holds that "safety" grievances are not subject to arbitration, and that strikes labeled unilaterally by an employee, a group of employees or a union as "safety" strikes are not enjoinable. The necessary effect of this ruling is to relegate all safety disputes to a no-man's land beyond the reach of arbitrators or courts. This ruling opens the door to self-help, rampant wildcat strikes, and chaos in the coal mining industry.

As dissenting Judge Rosenn so aptly said:

> "If employees may label another employee a working risk and thereupon engage in a work stoppage which, because of its characterization as a safety strike, is unreviewable by arbitration or court, no employer can expect stability in labor relations. Moreover, each employee is the possible victim of the attitudes, fancies and whims of his fellow employees. Unions, themselves, will be at the mercy

> of 'wildcatters.' In my opinion, such a rule not only runs directly counter to our national policy of promoting labor stability but opens new and hazardous avenues in labor relations for unrest and strikes." Opinion, pp. 9-10.

The references by Judge Rosenn to "wildcatters," "unrest" and "strikes" is especially apt in the coal industry. The coal mining industry has the worst record by far of any major industry in production lost and wages lost due to wildcat strikes over individual grievances, frequently minor in nature, which could have been resolved under the contract procedures for settling disputes. In 1971, alone, 565,827 man days, 8,962,062 tons of production and $21,981,476 in wages to coal miners were lost due to wildcat strikes. Since the payments to the local miners' welfare and pension trust are based on a royalty on coal produced, these wildcat strikes resulted in a loss of approximately $3,740,000 to the welfare and pension fund.

Although BCOA sees a ray of hope in the fact that coal miners are beginning to utilize the contractual grievance-arbitration procedures with more frequency, the decision of the court below can only encourage a higher incidence of resort to wildcat strikes.

The present decision comes at a time when greater labor stability and continuity of production are essential if the coal industry is to meet its share of the Nation's growing energy needs.

In bringing about greater awareness among coal miners of the availability of expeditious and just grievance-arbitration procedures and the need to utilize them as an alternative to the wildcat strike, the decisions of this Court in the *Steelworkers Trilogy*

(strengthening arbitration); in *Local 174, Teamsters* v. *Lucas Flour,* 369 U. S. 95 (1962); and *Boys Markets* (enforcing the obligation to arbitrate rather than strike) have played an important, indeed an essential, role. In case after case that has arisen, the courts, in reliance on these decisions, have begun to channel miner grievances into the peaceful channels of arbitration under the agreement. The lessons are hard to learn but they are beginning to take hold.

It is a notorious fact that throughout the coal producing regions, the mere presence of a single picket at a coal mine has long been enough to signal a complete shut down of the mine; and "roving pickets" have long followed a familiar pattern of going from mine to mine shutting them down one by one because of a single grievance at a particular mine that could be readily resolved by peaceful arbitration.

Old habits are hard to break, and the wildcat strike as a way of life in the coal regions has deep roots in the past. It will take the combined efforts of the employers, the Union at all its levels, the employees and the arbitrators and courts to bring about a gradual acceptance by the miners of the amelioratory course of impartial arbitration. *Boys Markets* teaches that, where there exists a contract and machinery for the final and binding resolution of grievances and disputes, a promise is implied on the part of the management, the union, and the employees, that they will utilize those procedures rather than resort to self-help, the lockout or the strike. The lower courts have, in numerous decisions, held that *Boys Markets* applies to the National Bituminous Coal Wage Agreement, and certainly there is no industry in which the aid of the courts to achieve labor peace is more urgently needed. Unquestionably, with-

out *Boys Markets,* chaos and the law of the jungle will continue to hold sway in the coal industry.

The court below has, as Judge Rosenn so clearly saw, created a unique legal interpretation which provides a ready escape from *Boys Markets.* All that an individual or group, pursuing his or their own selfish motives, need do is advance a specious grievance, label it a "safety issue," mount a wildcat strike, and the dispute would be non-arbitrable and the courts would be powerless to intervene. That is, incredibly, the ruling of the court below.

This case was decided under the prior 1968 agreement. It is noted that the 1971 agreement contains a special grievance-arbitration procedure for resolving health or safety disputes. However, the provision for the settlement of local disputes in the 1968 agreement was exceedingly broad, and encompassed safety disputes as well as all other local disputes of any kind.

The court below states that *Boys Markets* is inapplicable because that decision is grounded on a finding that the dispute in question is subject to compulsory arbitration under the labor agreement. The Court then postulates that "safety" disputes are not subject to arbitration under the National Bituminous Coal Wage Agreement.[3] This assumption is totally unwarranted in fact or law. This type of dispute has always been arbitrated under the Coal Wage Agreement.

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[3] The court below stated in a footnote:

> "It is also unnecessary to decide whether, in the unlikely case of a contract specifically declaring that safety disputes are subject to compulsory arbitration, a work stoppage over a safety dispute would be enjoinable." Opinion, p. 6. The 1971 agreement contains precisely such a provision, and, even before that, there was never any question that safety disputes were arbitrable under the general arbitration clause of the agreement.

The decision of the court below offers no alternative to arbitration or to application of *Boys Markets*. It repeals *Boys Markets* for safety disputes and unleashes employees and unions and employers to take matters into their own hands, to strike, to lockout and to create economic havoc over any safety issue, real or imagined. But the decision below offers no alternative means of settlement or resolution of the underlying dispute either by arbitration or by court adjudication. This invitation to the law of the jungle in a critical area of labor-management relations—health and safety—is in open and direct contradiction to the national policy as expounded by this Court of encouraging resort to arbitration to resolve all types of grievances and labor-management disputes.

The court below has decided two fundamental issues contrary to the policies of this Court. They are:

(1) That a wildcat strike is not enjoinable under *Boys Markets* if it purports to be over a safety issue; and

(2) That a safety issue is *sui generis* and not arbitrable under a broad grievance-arbitration clause.

The court, indeed, went so far as to brush aside the fact that this particular dispute was in fact arbitrated under the Order of the District Court between the dates of issuance of the preliminary injunction and the decision of the Appellate Court. Moreover, the impartial umpire mutually selected by the parties held that there was no safety hazard to the employees. The decision of the court below had the effect of nullifying the arbitrator's decision, again in opposition to basic principles established by this Court.

It is no exaggeration to describe this decision as an invitation to chaos in the coal industry.

B. THE DECISION OF THE COURT BELOW CONFLICTS WITH FUNDAMENTAL PRINCIPLES OF LABOR LAW AND POLICY ESTABLISHED BY THE COURT

The Court has made it clear time after time that nothing is more basic to the national labor policy than the principle of strongly favoring arbitration against stalemate and self-help in resolving labor-management disputes.

The decision of the court below conflicts directly with every facet of that policy, and, in a broad spectrum of disputes—those involving safety—literally stands that policy on its head.

The decision of the court below, therefore, while of immediate concern to the coal industry, has a broader impact on industry at large. With the growing concern for safety and the proliferation of legislation and regulation in this field, the carving out of all safety issues from arbitration under labor agreements will create a vast no-man's land where only the primitive weapon of trial by combat prevails.

1. The Decision of the Court Below Runs Directly Counter to the Steelworkers Trilogy.

In the three landmark cases decided by the Court in 1960, the Court created a strong presumption favoring arbitration of grievance disputes. *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U. S. 564 (1960); *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960); *United Steelworkers of America* v. *Enterprise Wheel and Car Corporation*, 363 U. S. 593 (1960). In effect, the Court held that where there exists an arbitration provision, all disputes are arbitrable unless specifically excluded from arbitration. As the Court

stated in *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 582-583 (1960):

> "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."

Nothing could be more plain than that. But here the court below applied the opposite presumption. The court said that safety disputes are not arbitrable under the broadest type of arbitration clause because it was not "particularly stated nor unambiguously agreed in the labor contract that the parties shall submit safety disputes to binding arbitration. . ." Opinion, p. 5.

Indeed, the court hinted very strongly that it would not require arbitration of safety grievances even if the parties expressly so agreed.[4]

2. The Decision of the Court Below Conflicts Directly with Steelworkers v. Enterprise Wheel and Car Corporation, 363 U.S. 593 (1960).

This decision forbids the courts to tamper with an arbitrator's award or his jurisdiction over the controversy unless the award is tainted by fraud or clearly antithetical to the agreement of the parties. As the Court said in *Enterprise*,

> "It is the arbitrator's construction which was bargained for, and so far as the arbitrator's deci-

[4] The decision of the court below conflicts broadly with the decision of the Eighth Circuit Court of Appeals in *Hanna Mining Co.* v. *Steelworkers*, F.2d , 80 LRRM 3268 (8th Cir. 1972). The opinion in the *Hanna* case distinguishes the *Gateway* decision on the facts, but it is clear that the two court decisions are in basic conflict in principle.

> sion concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." 363 U. S. at 599.

Here, the court below in a collateral attack on the arbitrator's award has not only ignored the admonition of the Court in the *Steelworkers Trilogy*, it has in effect set aside the arbitrator's award and substituted its own contrary interpretation of the labor agreement.

3. The Decision of the Court Below Conflicts Directly with the Decision of the Court in Boys Markets, Inc. v. Retail Clerks Union, 398 U.S. 235 (1970).

The Court in *Boys Markets* reversed *Sinclair Refining Co.* v. *Atkinson*, 370 U. S. 195 (1962), and held that a federal court may enjoin a strike over an arbitrable grievance. *Boys Markets* cannot be viewed in isolation. It is part and parcel of the national policy of encouraging resort to peaceful arbitration rather than economic warfare to settle labor disputes.

The District Court in this case applied *Boys Markets* and ordered arbitration of the dispute. The strike was enjoined in the interim under terms that fully protected employees from any possible hazard to their safety. The arbitrator heard the case and found no hazard to exist.

The court below found that *Boys Markets* did not apply because the dispute was a safety dispute and therefore not arbitrable. The injunction was vacated and the arbitrator's award nullified. The parties were presumably left to their own devices with future prospects for finding peaceful means of adjusting safety disputes by arbitration being apparently foreclosed. A more negative and sterile doctrine can scarcely be imagined.

4. The Decision of the Court Below Conflicts Directly with the Uniform Interpretation of § 502 of the Labor-Management Relations Act.

To bolster its unique view that "safety" issues are by their very nature not arbitrable, the court below called upon its interpretation of § 502 of the Labor-Management Relations Act. This Section provides that when employees in good faith quit work because of abnormally dangerous conditions, it shall not be deemed a strike. The court further reasoned that if a union honestly believes a safety issue exists it has satisfied its burden under § 502.

The argument is faulty in two major respects. First, as Judge Rosenn pointed out, the uniform interpretation of § 502 has been that to justify a walkout over unsafe conditions of work, the union must present ascertainable, *objective* evidence that an abnormally hazardous condition did in fact exist. See *Philadelphia Marine Trade Association* v. *NLRB,* 330 F. 2d 492 (3d Cir. 1964), *cert. denied,* 379 U.S. 833, 941; *NLRB* v. *Knight Morley Corp.,* 251 F. 2d 753 (6th Cir. 1957), *cert. denied,* 357 U. S. 927; *Redwing Carriers, Inc.,* 130 NLRB 1208 (1961), *enf'd as modified,* 325 F. 2d 1011 (D.C. Cir. 1963), *cert. denied,* 377 U.S. 905.

Second, even if a temporary cessation of work might be justified by objective evidence of abnormal danger, there is nothing in § 502 to suggest that a safety dispute is not a proper subject for arbitration. If an honest difference of opinion exists, some mechanism must be found for its peaceful resolution. Arbitration is the means that the parties here have chosen. The decision of the court below denies them that peaceful and time honored avenue and leaves them to their own devices.

CONCLUSION

BCOA submits that the decision of the court below is a major retrogressive step which, if not reversed, will create chaos and confusion throughout the coal fields. The proposition of law it expounds is retrogressive and dangerous. Its adverse impact on labor relations in the coal fields is immediate and apparent; and its philosophy and rationale present a clear and present danger to peaceful labor relations in the coal industry on a national scale.

BCOA respectfully urges the Court to grant the writ so that this issue may be reviewed on its merits.

Respectfully submitted,

GUY FARMER
Patterson, Belknap, Farmer & Shibley
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036
General Counsel for Bituminous Coal Operators' Association, Inc.